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# In the Supreme Court of the United States

OCTOBER TERM, 1940

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No. 130

WILLARD MANUFACTURING COMPANY, PETITIONER

v.

J. E. KENNEDY, FORMER COLLECTOR

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No. 131

WILLARD MANUFACTURING COMPANY, PETITIONER

v.

ROBERT W. MCCUEN, COLLECTOR

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*ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND  
CIRCUIT*

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court (R. 28-33) was not reported. The opinion of the circuit court of appeals (R. 229) is reported in 109 F. 2d 83.

JURISDICTION

The judgment of the court below was entered February 10, 1940, in each of the constituent cases

(1)

separately (R. 235-236). A Justice of this Court extended the time for filing a petition for certiorari for 60 days from April 22, 1940 (R. 237). The petition was filed June 6, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

#### QUESTIONS PRESENTED

1. Whether petitioner in its 1920 tax return valued its inventory at "cost or market, whichever is lower," and, if so, whether in the circumstances of this case petitioner was entitled to value its inventory on that basis.
2. Whether the evidence supports the concurrent findings of the courts below that the market value of petitioner's inventory was not lower than the value employed for tax computation.

#### STATUTE AND REGULATIONS INVOLVED

The pertinent statute and regulations are set out in the Appendix.

#### STATEMENT

Petitioner, a manufacturer of cotton clothing, brought these two suits, which were consolidated for trial, to recover a claimed overpayment of income and excess profit taxes for petitioner's fiscal year ending August 31, 1920. Petitioner's declarations assert that petitioner valued its inventory as of August 31, 1920, "at cost or market, whichever is

lower," and that the valuation was excessive, because more than market. (R. 5, 8.)

The district court accepted petitioner's assertion that it valued its inventory at "cost or market, whichever is lower," but it found that the market value was not lower than the value employed in computing the tax, and therefore denied recovery (R. 29-33).

The circuit court of appeals affirmed. It held that petitioner, in its 1920 return, had valued its inventory at "cost", and not at "cost or market, whichever is lower", and that petitioner was not entitled to value its inventory on the latter basis. Further, it affirmed the finding of the district court that the market value of the inventory on August 31, 1920, was not lower than the value on which petitioner's tax was computed.

#### **ARGUMENT**

Originally in tax computation only cost was recognized as the basis for inventories. In December, 1917, the Treasury Department ruled that a taxpayer might use either (a) cost or (b) cost or market price, whichever is lower. T. D. 2609, 19 Treas. Dec. Int. Rev. 401. Accordingly Regulations 45 (1920 edition), Article 1582, provided:

\* \* \* A taxpayer may, regardless of his past practice, adopt the basis of "cost or market whichever is lower", for his 1920 inventory, provided a disclosure of the fact and that it represents a change is made in

the return. Thereafter changes can be made only after permission is secured from the Commissioner. \* \* \*<sup>1</sup>

1. Petitioner's 1920 return stated that its inventories were priced on the basis of cost,<sup>2</sup> and thus made no disclosure of a change to a "cost or market, whichever is lower" basis, as was provided for in Regulations 45, Article 1582. Petitioner asserts, however, that its inventory was in fact taken on the basis of cost or market, whichever is lower, and that it was not necessary under the regulations for it to so disclose in its return in order for it to be entitled to use that basis, firstly, because it had employed the cost or market, whichever is lower, basis in its prior returns, so that its use represented no change, and, secondly, and alternatively, because the regulation was adopted after its return was filed.

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<sup>1</sup> Regulations 45, article 1582, is set out in full in the Appendix, *infra*, p. 9. See also T. D. 3296, 24 Treas. Dec. Int. Rev. 531.

Section 203 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, set out *infra*, p. 8, provides that when the use of inventories is necessary in order to determine income, inventories shall be taken "upon such basis as the Commissioner, with the approval of the Secretary, may prescribe" as conforming to the best accounting practice and as most clearly reflecting the income.

<sup>2</sup> The circuit court of appeals so stated in its opinion (R. 231) and petitioner so concedes (Pet. 9). Petitioner's 1920 tax return was put in evidence (R. 39) and was before the circuit court of appeals, but petitioner omitted to have the exhibits certified to this Court.

The district court upheld petitioner's contention that in its 1920 return petitioner inventoried its merchandise at " 'cost or market', whichever was lower, \* \* \* as it had done in prior years" (R. 29, 33-34). The circuit court of appeals held that the record did not support the district court's finding in this respect (R. 231). It stated that the 1920 return was based on cost, and that cost was apparently the basis used in petitioner's returns for the three preceding years (R. 231).

Petitioner asserts that the evidence supports the district court (Pet. 8-10). Petitioner has omitted, however, to certify to this Court the exhibits, including its tax returns for 1920 and prior years, which were before the circuit court of appeals and on which it made its decision. Hence there is no opportunity for adequate consideration of this question by this Court.<sup>3</sup>

Moreover the evidence on which petitioner relies relates wholly to its 1920 return, and in no way goes to establish that its prior returns were on the basis

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<sup>3</sup> This is well illustrated by the evidence on which petitioner relies (Pet. 8-9). All of the cited evidence (R. 43, 61, 79) is discussion or explanation of petitioner's original inventory, from which the inventory valuation in its 1920 tax return was taken. The original inventory was in evidence (Exhibit 10, admitted R. 69), but it is not before this Court. It was the Government's position below, evidently accepted by the court, that the inventory itself showed that the prices were at cost and not at market value. If so, it was plainly proper for the court below to disregard the testimony to the contrary.

of cost or market, whichever was lower. Apparently so recognizing, petitioner next asserts (Pet. 10-12) that even if its returns before 1920 were on a cost basis, it was not necessary for its 1920 return to disclose that it was on a new basis because the return was filed before promulgation of Regulations 45, Article 1582, requiring disclosure of a change of basis.

The decisions cited by petitioner in this connection (*Howard Company v. Commissioner*, 15 B. T. A. 1096; *Peck & Hills Furniture Co. v. Commissioner*, 16 B. T. A. 1008) hold that a taxpayer who filed a return on a cost basis before the regulation was issued was entitled thereafter to file an amended return changing to a basis of cost or market, whichever is lower. Petitioner never sought to amend its return; its claim as to cost or market valuation was first advanced in its refund claim filed in 1926. These decisions permitting the taxpayer to amend to take advantage of the regulation do not support petitioner's claim to ignore the regulation. Proper tax accounting practice would not, even in the absence of the regulation, have permitted petitioner to alter the basis of its tax returns without so disclosing.

Finally, this question arises in this case only upon acceptance of petitioner's contention that its 1920 return was at cost or market, whichever is lower, and that contention is not properly before

the Court and, if it were, would present no question of general importance.

2. The district court, although it accepted petitioner's other contentions, denied recovery because it found that the market value of petitioner's inventory on August 31, 1920, was not lower than the value employed in computing petitioner's tax (R. 28-33). The circuit court of appeals sustained this finding as supported by evidence and stated that this ground was alone sufficient to sustain its decision against petitioner (R. 233). This question is wholly one of fact and, both courts below having decided it against petitioner, there is no occasion for this Court to review it.

#### **CONCLUSION**

It is respectfully submitted that the petition should be denied.

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JUNE, 1940.